United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7383

In The

United States Court of Appeals

For the Second Circuit

JACK A. KAMPMEIER, et al.,

Plaintiffs-Appellants,

vs.

EWALD NYQUIST, et al.,

Defendants-Appellees.

On Appeal From The Decision And Order Of The United States District Court For The Western District Of New York

Civ 76-167

BRIEF FOR APPELLEES

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Table of Authorities Cited

Statement of the Case

Appellants seek to reverse an order denying preliminary injunctive relief issued by the Hon. Harold P. Burke in the United States District Court for the Western District of New York (A-58).*

Appellants are public junior high school students and their parents. The students desire to participate in intramural and interscholastic athletics including contact and collision sports.

Each of the infant appellants has virtually no vision in one eye (A-23, A-50). The school medical inspectors of the appellee School Districts have examined the students and declined to allow them to participate in contact or collision sports in light of the respective individual examinations.

Statement of the Issues

Was preliminary injunctive relief properly denied?

*References are to the Appendix annexed to Appellants' Brief.

Argument

POINT I PRELIMINARY INJUNCTIVE RELIEF WAS PROPERLY DENIED.

In denying Plaintiffs' application for a preliminary injunction the trial court found that there was "no showing that the plaintiffs will surfer irreparable harm if a preliminary injunction is denied, nor that plaintiffs are likely to succeed in this action." (A-60) The court chose the proper criteria and applied them properly to Plaintiffs' application.

Plaintiffs have not satisfied the first criterion in that they have not shown they will suffer irreparable harm if a preliminary injunction is denied. Indeed they have not shown that they have suffered irreparable harm since their application was denied in July, 1976. Plaintiffs are still attending classes. They are still permitted to participate in a number of non-contact sports which would enable them to develop and maintain their physical health, athletic skills, and social adjustment. There has been no allegation that either plaintiff has prospects for a career in a professional contact or collision sport, nor that such prospects are irreparably harmed.

Likewise plaintiffs have not satisifed the second criterion in that they have not shown that they are likely to succeed in this action. A number of factors combine to

preclude such a showing: the inapplicability of statutory or decisional authorities, the uncertainty regarding what standard applies to the constitutional claim, the facts of this case regardless of the applicable constitutional standard, and the burden of proof.

Plaintiffs argue that the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., supports their claim for preliminary injunctive relief. Section 504 of the Act, codified at 29 U.S.C. §794, does not prohibit the exclusion of all handicapped persons from participation in any program or activity receiving federal financial assistance. It prohibits the exclusion of such an individual "solely by reason of his handicap." The appellees have not excluded Plaintiffs from participation in contact or collision sports solely by reason of their handicaps. Far from automatically stereotyping the Plaintiffs, appellees have provided for individual examinations of them. Rather than simply determining if Plaintiffs have a present handicap, appellees determined that their future health would be jeopardized. Furthermore, Plaintiffs have not shown that the contact and collision sports in which they seek participation, are programs or activities receiving federal financial assistance.

Plaintiffs have cited Hairston v. Drosick, U.S.D.C., S.D. W. Va. 1976, for the proposition that the Rehabilitation Act of 1973 supports their claim. Plaintiffs reliance on

Hairston is misconceived. In Hairston no medical examination had been conducted and no compelling reason, medical or otherwise, had been found for the exclusion of the plaintiff. The disability in Hairston was milder than in this case, namely spina bifidism rather than partial blindness. The activity at stake in Hairston was more precious, namely attendance at classes rather than participation in contact or collision sports. The alternatives to an injunction were grimmer in Hairston, namely placement in a school failing to meet state requirements or no placement at all, rather than the opportunity to participate in non-contact sports.

Similarly plaintiffs have cited a number of cases for the proposition that the equal protection clause and the Fourteenth Amendment of the Federal Constitution support their claim. Such cases should be distinguished. In Suemnick v. Michigan High School Athletic Association, et al., U.S.D.C., E.D. Mich. 1973, the plaintiff had demonstrated by playing and by medical testimony that there was no particular risk to himself or to others in allowing him to play one more game with a padded, plastic foot and ankle. In this case there has been no such medical evidence and the period of exposure to risk is one of years instead of hours. Furthermore there has been no showing that a prosthetic device is available to these plaintiffs as in Suemnick. In Borden v. Rohr, U.S.D.C., S.D. Ohio, 1976, a one eyed college

student suing in his own name obtained an injuncion permitting him to play basketball. Not only was the plaintiff in Borden mature enough to assume risks to his own health, but his teammates and competitors were collegians who were presumably mature enough to evaluate whatever risks to themselves might accompany playing with a one-eyed man. Furthermore the standard for review of a collegiate regulation is much stricter than for the practices at issue in this case. In Alex v. Allen, 409 F.Supp. 379, the district court for the Western District of Pennsylvania quoted with approval Black Coalition v. Portland School District No. 1, 484 F.2d 1040, (9th Cir., 1973) as follows:

> "[G]reater flexibility may be permissible in regulations governing high school students than college codes of conduct because of the different characteristics of the educationational institutions, the difference in the range of activities subject to discipline, and the age of the students."
>
> [The Alex court continued:]
>
> In addition, a looser standard of constitutional review of high school regulations is appropriate because of the greater flexibility possessed by the state to regulate the conduct of children as opposed to adults. In Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), the court held:
>
> "Even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."

Plaintiffs further cite cases regarding female athletes, including Brenden v. Independent School District, 477 F.2d 1292, (8th Cir., 1973) and contend that their position is no different than that of young females seeking to play baseball. We submit that there is a significant difference between exclusion based upon sex without individual analysis of ability and exclusion based upon an individual medical examination.

Traditionally one of two standards applies to equal protection claims; the standards are the so-called "rational basis" and "compelling governmental interest" tests. Plaintiffs believe they discern a third "sliding-scale" test, application of which would make it more likely that they would succeed. Whatever the applicability of such a third test to adoption of illegitimate children, Matter of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975); to social security benefits for illegitimate children, Jimenez v. Weinberger, 417 U.S. 628 (1974); to administrators of estates, Reed v. Reed, 404 U.S. 71 (1971); or to ages of majority for purposes of support laws, Stanton v. Stanton, 421 U.S. 7 (1975); it is by no means certain that such a test would apply to this case. This is especially so in view of Brenden, supra which held that the "rational basis" test is the proper standard for equal protection review of restrictions on interscholastic athletics.

It is inappropriate to apply the "compelling governmental interest" test to this case because education is not a fundamental right for purposes of review under the equal protection cause. San Antonio Independent School District et al. vs. Rodriguez et al., 411 U.S. 1 (1973). The "rational basis" test mandated by Brendan, supra, is satisfied by the individual, medical examination on which restriction is based. But even if some third test applied in which the rational basis were subject to a review on a sliding scale, the test would be satisfied here. Weighing the age of plaintiffs, the seriousness of their blindness, the evidence of risk to themselves, the possibility of risk to others, the lack of satisfactory prosthesis, and the opportunity to play non-contact sports against the minimal inconvenience of exclusion from particular contact and collision sports, it cannot be said that plaintiffs are likely to succeed under any standard of review of the equal protection claim.

Finally there is a heavy burden on a party seeking the extraordinary remedy of preliminary injunctive relief. Pride v. Community School Board of Brooklyn, New York School District No. 18, 488 F.2d 321 (2nd Cir., 1973). In view of that burden, it was proper for the district court to deny preliminary injunctive relief and to require Plaintiffs to proceed in the main action.

Conclusion

For the foregoing reasons, Appellees Andrews, Burns, Farnsworth, Hosenfeld, Kolb, Lundy, McGavern, Pitler, and Skawski respectfully submit that the decision of the Court below denying preliminary injunctive relief should be affirmed.

Dated: October 27, 1976
Rochester, New York

Respectfully submitted,
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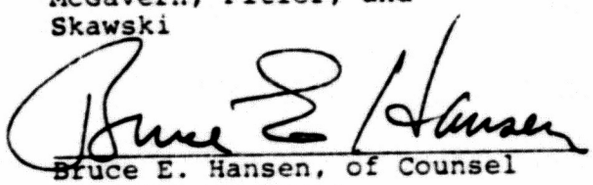

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Johnson D. Hay/Publisher
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The Daily Record

October 27, 1976

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Attorney(s) for

Appellees

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